

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL 75-6037

United States Court of Appeals

For the Second Circuit.

HANNA B. WAKIM,

Plaintiff-Appellant,

-vs.-

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appellant's Brief

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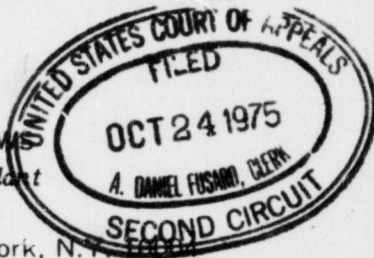


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**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

HANNA WAKIM

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA

Defendant-Appellee.

APPELLANT'S BRIEF

STATEMENT

This is an appeal by the plaintiff from a judgment entered in favor of the defendant after a trial to the Court on plaintiff's claim for personal injuries sustained while in defendant's employ as a merchant seaman.

FACTS

Plaintiff was born August 15, 1931 in Lebanon (4). He emigrated to the United States in 1969, joined the Sailors Union of the Pacific and obtained his first employment as ordinary seaman on the S/S SIOUX FALLS VICTORY on October 4, 1969 (6). He had never gone to sea before (6). His ability to speak and understand English was extremely limited (6).

The vessel proceeded from Sunny Point, North Carolina to the Panama Canal Zone. On October 15, 1969 the plaintiff went ashore in Colon, Panama in the company of other crew mem-

bers. Because he does not drink, he went window shopping alone while the others visited a bar. While so engaged he was mugged and robbed (9). He reported this occurrence to the local police, but did not require or request medical attention (11).

He sailed with the ship from Colon to Vietnam and up until the time of his accident on November 26, he worked 120½ hours of overtime (Exhibit 13, 143a). Since the union agreement does not provide for overtime for Saturday and Sunday watches (12), this overtime consisted entirely of work performed outside of plaintiff's regular watch hours and shows that he worked an average of three hours overtime per day. According to the ship's chief officer, he was a very good and willing worker. (A34)

Plaintiff suffered some discomfort in his neck and shoulders as a result of the mugging, but it never troubled him enough to interfere with the performance of his duties on board ship, including the working of substantial overtime as described above. He was sent ashore to a doctor in Vietnam with the complaints of pain in his neck and arms and with a paper from the ship (14) which gave the history of the mugging in Panama (92). He received some treatment which made him feel better (14). He lost no time from work (13).

In the early morning hours of November 26, Wakim, who was ordinary seaman on the 12 to 4 watch and who was standing lookout on the bow of the vessel, was called back to the bridge by the mate on watch because it was expected that the vessel was about to encounter heavy weather (79). While proceeding aft on the portside of #3 hatch he was caused to slip on an oil spill (52-53) which had apparently leaked from one of the winches (36-37). He slipped and fell to the deck, striking his back and his head (52-53). He got up, continued his journey aft into the midship house where he was seen by the third cook Williams with grease on his clothing (21). He did not report his fall to the mate on watch, because he could not express himself in English (54). Later during the watch, the mate noticed Wakim was not feeling well and permitted him to knock off before the end of the watch (55).

Thereafter, Wakim attempted to resume his duties but became increasingly disabled and was soon knocked off duty until the vessel arrived in Okinawa on or about December 5, 1969. (57) At Okinawa he was sent ashore to a doctor with papers from the ship's purser containing only the history of the mugging, with no mention of the November 26 fall (58, 92). No other history was obtained from plaintiff at Okinawa. He was examined and found to be not fit for duty, and returned to the United States, where he was seen two days later at the Public Health Service Hospital, Staten Island. There, plaintiff gave a history of slipping while going to lookout and injuring his right ankle and upper back with increasing weakness since that time (106). The ensuing medical records are confused not only because of the obvious language problem (an example of which is the fact that it was impossible to handle even his dental problems without having him come in with an interpreter [123]) but also by reason of the fact that there was weakness not only of the left leg, which is consistent with a back injury, but also of the left arm as well (108). The conjunction of these symptoms with dizziness caused the doctors at Public Health at first to focus on the head injury (124). It was not until some time later that the possibility of a herniated intervertebral disc was considered and treatment instituted for that condition (132). By December 7, 1970, Wakim's back pain had increased so that he was sleeping on the floor (119). As a result of plaintiff's persistent back pain and weakness and pain on the left leg, the doctors at the Staten Island Hospital recommended surgery, which was performed on December 21, 1973.

Two orthopedic surgeons testified at the trial. Dr. Irving Maver, testifying on behalf of plaintiff, had examined the plaintiff both before and after the 1973 surgery. On both occasions he found objective evidence of a permanent back injury (A77). This is consistent with the findings of the doctors at Staten Island. Dr. Howard Balensweig, who testified on behalf of the defendant, had not examined plaintiff before the surgery, but his father had. He testified on the basis of his father's report

to an absence of objective finding before the surgery. The senior Balensweig found no evidence of an hysterical (psychogenic) condition (88). Howard Balensweig, on the other hand, expressed the opinion that all symptoms prior to the surgery were psychogenic in nature (A108). He agreed that following the surgery and at the time of the trial plaintiff was disabled as a result of an unsuccessful spinal fusion (A99, A108).

The Staten Island Hospital record (132, 138-139) clearly related the surgery to the fall aboard ship in November, 1969. Dr. Maver agreed (A81-A83) Dr. Balensweig, on the other hand, expressed the opinion that the surgery was totally unnecessary (A99, 108).

THE PROCEEDINGS BELOW

Suit was commenced in the Southern District of New York on July 22, 1970. Issue was joined on September 25, 1970. The case came on for trial before the Honorable Gus J. Solomon, Sr., Chief Judge of the U.S. District Court for the District of Oregon, sitting by Special Assignment in the Southern District of New York on October 9, 1974. The trial was to the Court. During the trial, various exhibits, including hospital records were deemed to be received in evidence. They were not seen by the Court, who preferred to review them after the trial (A117). Although the Court had indicated to counsel that argument would be heard at the conclusion of the case (A98), no argument was heard before the Court announced its tentative decision (A112-116). The Court indicated that it would check the hospital records carefully before arriving at a final decision (A112, A117). The Court requested post-trial briefs, and allowed plaintiff two weeks after receipt of defendant's brief to serve and file a reply brief (D43). Extensions of time were granted plaintiff. On January 2, 1975 plaintiff's post trial brief was served on counsel for defendant, along with the medical records, which counsel for plaintiff had retained in his possession after the trial (98). On January 3, 1975 plaintiff's post-trial brief was mailed to Judge Soloman (100). On January 22, 1975, counsel for defendant mailed his

post-trial brief to the Court, and to plaintiff's attorney, at the same time returning the medical records to plaintiff's attorney to be forwarded to the Court along with plaintiff's reply brief (99). On January 24, 1975, without having received either plaintiff's reply brief, or the exhibits, the Court handed down its memorandum opinion (143), denying recovery on the ground of unseaworthiness or negligence without passing on the question of maintenance. On April 9, 1975 an amended judgment was entered pursuant to the Court's opinion. On April 21, 1975 the claim for maintenance was settled and dismissed. This appeal is from the judgment of April 9, 1975.

QUESTIONS PRESENTED

1. Did the trial Court err in failing to consider exhibits which it had received in evidence, but had not read?
2. Was the decision of the trial Court clearly erroneous in finding that plaintiff's complaints were functional rather than physical and that they may have resulted from the mugging but not from any accident on the vessel?
3. Should the Court have considered the possible liability of the defendant on the basis of negligent treatment by the U.S. Public Health Service?

POINT I

THE TRIAL COURT ERRED IN FAILING TO CONSIDER PLAINTIFF'S EXHIBITS BEFORE DECIDING THE CASE

Three points were strongly emphasized by the defendant and apparently accepted by the Court:

1. Plaintiff understood the English language (144).
2. Plaintiff did not complain of injuring his back until one year after his alleged shipboard accident (A97-A99).

3. Until the fusion operation of December 1, 1973, all of plaintiff's complaints were psychogenic in origin.

The exhibits which the Court admitted into evidence but never read bore on one or more of the above points, and could well have tipped the scales in plaintiff's favor. For instance, the physical examination record from plaintiff's first admission to the Staten Island Hospital (126) noted that plaintiff "speaks very poor English". As late as June, 1972, the records of the dental service of that same hospital show that it was necessary for Wakim to return to the clinic with an interpreter so that a matter as simple as oral hygiene could be explained to him (123). The trial Court, on the other hand, first saw Wakim five years after his accident, during which time he had been living in the United States with consequent improvement in his ability to speak and understand English. It is little wonder that without considering the important records of the public health service that the Court concluded that "plaintiff understood the English language and could either express himself or could convey his meaning to people who only spoke English" (144).

The testimony of Dr. Balensweig, which the Court accepted (112), hinged on two premises.

1. The plaintiff did not complain of injuring his back until 1 year after his alleged shipboard accident (A97-A99).

2. Until the fusion operation of December 2, 1973, all of plaintiff's complaints were psychogenic in origin.

If the Court had read and considered the hospital records from Staten Island it would have been apparent that those records noted an injury to plaintiff's right ankle and upper back when he slipped while going to lookout (106). This entry was made on December 6, 1969, on plaintiff's very first visit to the clinic. A week later, Wakim complained of weakness of his left leg (108), and three weeks later of pain on climbing stairs (110).

Further, when plaintiff was admitted to the Staten Island Marine Hospital for treatment and tests for his back condition,

the following past history was noted (132):

"This is a 41 year old male who has been seen and followed at this hospital over the past three years with *signs and symptoms* of a herniated disc with left-sided radiculopathy. His condition has gradually worsened in regard to the back pain and the left radiculopathy . . . EMGs repeatedly show abnormality.

The previous history revealed that 3½ years ago, on board ship, he injured his back when he fell in a puddle of oil. At that time, he also cut his left leg. Since that time, patient has been having back problems."

. . . "Patient's trunk motion was restricted with pain in the lumbosacral level and down the posterior left extremity. The flip test and Lasegue tests were positive. Straight-leg-test on the right was positive at 80 degrees which was probably due to tight hamstrings. On the left, it was positive at 60 degrees which was due to sciatic radiation. There was weakness of his plantar flexors and extensor hallucis longus on the left. He had decreased muscle tone on the left including his left gluteus maximus. There was tenderness at the lumbosacral level in the left iliolumbar area. Deep tendon reflexes were as follows:

Knee jerks 1+ on the right and 0 on the left; ankle jerk 1 on the right and 0 on the left."

and at (133) . . . The patient was seen by the Chief of Orthopedics, Dr. Purlia, who, after examining the patient and reviewing the history, thought that he showed signs of a chronic lumbosacral sprain with left radiculopathy and probably had a herniated nucleus pulposus. He recommended that the patient have a laminectomy in view of the long chronicity and also because of his present findings. . . "

Formidable as these records were, the Court expressed a strong disinclination to having them read to him by doctors from the stand (A80). The Court indicated that counsel would have

the opportunity of arguing the case at its conclusion (A93). Instead of hearing argument, the Court announced its tentative decision immediately after Dr. Balensweig's testimony, though adding (A112) "I want to check the hospital records myself carefully."

Further bolstering Dr. Balensweig's contention that until the surgery of December, 1973 plaintiff's complaints were psychogenic, is the following entry from the physical therapy department in April, 1973, 8 months before (135).

... "There is a straight leg raising on the L at about 60°. There is an increase in lumbar curve, muscle spasm is present bilaterally in the low paravertebral and thoracic paravertebral muscles. . .

and the following note by Dr. Purlia (136):

... "EMGs repeatedly show abnormalities."

The narrative summary of the plaintiff's hospitalization of December 1973 states (138):

"This patient is a 42 year old American seaman, who was injured aboard ship in November, 1969, when he slipped in grease and fell, injuring his back and striking his head against the deck. He was taken off the ship in Okinawa and from there he was evacuated to this facility. His initial treatment and diagnosis was complicated by language difficulties and diffuse symptoms. . .

... "Straight leg raises positive on the left at 45 degrees. Decreased strength in dorsiflexion on the left and also plantar flexion of the left foot. Decreased muscle tone of the left lower extremity. . . "

For the Court to decide this case based upon a finding that plaintiff's complaints were functional, rather than physical, without even reading the hospital records, denied the plaintiff a fair trial.

POINT II

THE DECISION OF THE TRIAL COURT THAT PLAINTIFF'S COMPLAINTS WERE FUNCTIONAL RATHER THAN PHYSICAL AND THAT THEY MAY HAVE RESULTED FROM THE MUGGING BUT NOT FROM ANY ACCIDENT ON THE VESSEL WAS CLEARLY ERRONEOUS

Functional complaints, or psychosomatic complaints as they are sometimes called, constitute a reaction of an individual to a stressful situation or event. By their very nature they usually manifest themselves very shortly after the triggering event. In this case, there was absolutely no evidence that plaintiff made any complaints about his low back following the robbery in Panama. He did not request or receive any medical attention in Panama. Instead, he returned to the vessel and did heavy work, averaging 3 hours overtime per day over the course of the next six weeks, until the accident of November 26. Are these the actions of a man suffering functional complaints resulting from a mugging? With reasonable certainty they are not.

Of course the Court's erroneous conclusion regarding the functional nature of the disorder suffered by plaintiff was contributed to by the failure to consider the medical records, as previously discussed in Point I.

POINT III

SHOULD THE COURT, HAVING FOUND THAT THERE WAS NO MEDICAL JUSTIFICATION FOR THE SURGERY PERFORMED ON THE PLAINTIFF BY THE PUBLIC HEALTH SERVICE DOCTORS, HAVE CONSIDERED WHETHER THE DEFENDANT WAS LIABLE TO THE PLAINTIFF FOR DAMAGE CAUSED BY NEGLIGENT TREATMENT.

All of the medical evidence clearly indicated that since the surgery of December, 1973, plaintiff has had serious physical disability. Dr. Balensweig claimed that such disability was caused by the surgery, which never should have been performed. Plaintiff never pleaded any cause of action in this case based upon improper medical care, because it was plaintiff's claim that the surgery was fully justified. The Court had allowed plaintiff's counsel two weeks after receipt of defendant's brief to submit a reply brief (A116), but decided the case without benefit of either the reply brief or the medical records. The point was raised in the reply brief, but never considered by the Court.

This Court has held that a shipowner may be liable for negligence of doctors treating a seaman, *Fitzgerald v. A.L. Burbank*, 451 F2d 670. Of course, if the treatment was negligently rendered by the Public Health Service, the plaintiff may press a claim against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346 c.f. *Rosario v. American Export-Isbrandtsen Lines, Inc.*, 395 F. Supp. 1192. Indeed, such a claim has now been made. Plaintiff raises the point here so that the opinion of this Court may make it clear that such a claim is not precluded by the judgment in this case.

CONCLUSION

The judgment appealed from should be reversed, and the case remanded to the District Court for a new trial.

Respectfully submitted,

PAUL C. MATTHEWS

MATTHEWS BRIEF

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

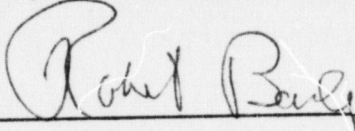
ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of October 1975 deponent served the within brief upon:

ZOCK PETRIE REID CURTIN & BYRNES

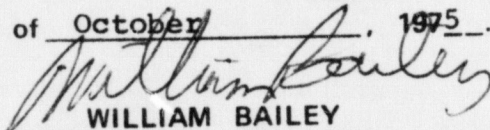
attorney(s) for ~~19~~ appellee

in this action, at 19 Rector St., NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Robert Bailey

Sworn to before me, this 24
day of October, 1975.


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976